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Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street NW, MS 4141
Washington, DC 20240

Re: Proposed rule governing Federal Acknowledgment of American Indian Tribes (Docket ID: BIA-2013-0007) (RIN 1076-AF18)

Dear Ms. Appel:

I write with comments on the proposed rule governing federal acknowledgment of American Indian tribes. This letter is divided into two sections, one with general comments on the rule and the other with comments on specific provisions.

GENERAL COMMENTS

I. THE REGULATIONS FAIL TO DIFFERENTIATE BETWEEN THE TWO SEPARATE PURPOSES THEY SERVE

A. The acknowledgment process serves two very different purposes

As the leading treatise on Indian law stated in 1982, "various purposes" are served by acknowledgment. *Cohen's Handbook of Federal Indian Law*, p. 3 (1982 ed.). The Handbook identified two very distinct purposes.

One purpose served by acknowledgment is to identify Indian groups that are eligible to receive federal benefits and services. The federal government provides certain services and financial benefits to Indian tribes, and the BIA, in administering these benefit programs, needs to determine which tribes are eligible for them. To this end, the List Act, passed in 1994, requires the BIA to maintain a list of recognized tribes. 25 U.S.C. §479a-1. Subsection (a) reads:

> The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

The second purpose of acknowledgment is to identify which Indian groups possess sovereign powers to govern their lands. Certain Indian tribes under certain conditions enjoy a limited right to govern themselves on their lands. On these lands, they are exempt from state law and are subject only to federal law. Acknowledgment is akin to recognition of political sovereignty.

These two purposes are very different. One, recognition of the right to federal benefits, confers these rights on the tribe. The other, recognition of sovereignty, confirms a legal status previously conferred. Determination of eligibility to receive federal benefits is set by these regulations. Existence of sovereignty is determined by common law and ultimately by Constitutional principles. As a recipient of federal benefits and services, tribes are in a dependent position; as a sovereign, the tribe is in controlling position.

B. Acknowledgment of rights to federal benefits is based on different criteria than acknowledgment of sovereignty.

The right to federal benefits is based on very different factors than is the existence of sovereignty. An Indian group might not have lands or might have lands but no sovereignty over them and still qualify for federal benefits.

1. Eligibility to receive benefits and services

In the mid-1800s, the Federal government assumed a guardianship relationship over Indian tribes, and since then has continuously provided services and benefits to Indians. In recent years, as Indians have assimilated into society, the question is raised whether they still qualify for these benefits. Under equal protection principles, benefits cannot be based on race alone. For this reason, the tribe must still exist as some sort of political entity to qualify for these benefits.

That said, the government retains a great deal of latitude to set criteria for the eligibility for these benefits. Qualification for federal benefits has never required that the Indian group hold rights to land (whether right to occupation, possession,

or title) or to sovereignty over that land. To the contrary, qualification has sometimes been based on the fact that Indians are landless and homeless. Such was the basis for the rancheria program in California between 1906 and 1958.

2. Possession of sovereignty.

In contrast, the existence of Indian sovereignty over a specific land site is based on very defined and specific criteria set by case law, and the government has no latitude to vary from the criteria in acknowledging Indian sovereignty. There are three specific factors. First, the Indian group must have aboriginal jurisdiction. In other words, they must have exercised jurisdiction over a specific site before the state in which the land sits was formed. Second, when the state was formed, the lands must have been reserved from state jurisdiction, either explicitly or implicitly. Third, since the state was formed, the tribe must have continuously exercised its jurisdiction over the site as a separate and distinct political community.

C. These two types of acknowledgment have very different impacts on third-parties

A tribe's eligibility for federal benefits and services implicate few if any concerns of third parties. Whether an Indian group qualifies for these benefits does not have any effects on third parties.

In contrast, recognition of a tribe's sovereignty over land could and often has had significant effects on third parties. If a parcel of tribal land is exempt from state and local laws, activities on the land can affect nearby residents, landowners, businesses and local government. Effects depend on three factors, proximity of the site to third-parties, the number of third-parties in the proximity, and the activities themselves. Building a casino that violates state and local zoning laws and state gambling laws can have very significant impacts.

The impacts have increased significantly in recent years as tribes have increasingly engaged in activities illegal under state laws, and attempted to use their exemption from state law to gain a competitive advantage over businesses that are subject to state law. This is most evident with respect to gaming, a business in which tribes were hardly involved in 1978, when the regulations were first adopted.

D. The proposed regulations fail to differentiate between the two types of recognition, to specify the different factors needed to qualify for each type of recognition, and to require consideration of the different concerns raised by each

The proposed regulations fail to differentiate between the two types of recognition. The regulations lump the two purposes together. Even worse, the regulations use the same criteria for both types of recognition. The criteria used do not comply with the case law on Indian sovereignty, and so are inappropriate with regard to that determination. They purport to allow recognition of tribal sovereignty without establishing the existence of that sovereignty before the state existed and without establishing consent by the state, and without establishing continuity since the state existed.

The proposed regulations also have procedural defects, failing to recognize the interests of third parties in claims by an Indian group to sovereignty over a site.

II. THE REASONS FOR CHANGING THE CRITERIA FOR ACKNOWLEDGMENT ARE IMPROPER

Although the criteria used for acknowledgment in the proposed regulations is entirely inappropriate for the purpose of determining the existence of Indian sovereignty, and we advocate use of the factors identified above as the proper criteria, we comment on some of the specific criteria proposed. The reasons given for these changes often make unfounded assumptions, have no basis and ignore historical reality.

We note that all Indian tribes that have any legitimacy have long-ago been recognized. Expansion of the country westward and settling of the interior was completed with the admission of New Mexico and Arizona in 1912. All Indian groups were by then known. In 1934, when Congress passed the IRA, it was interested in protecting existing tribes, but would not have expected new tribes to be recognized. All the more so now, 80 years later. Further, the criteria delineated by Felix Cohen in 1942 for recognition of tribes would have made sense then, but today, over 70 years later, is very out of date. Nowadays tribes can be recognized that are little different than social clubs such as an Italian-American club, a Russian-American club or the like.

The Executive Summary explains that the reason for defining historical as 1900 or earlier and not requiring proof from as early as 1789 is that over the last 40 years, "any group that has proven its existence in 1900 has proven its existence prior to that time." That reasoning fails in light of the fact that the regulations have never made the distinction between acknowledgment of rights to benefits and determination of sovereignty. With that distinction, a showing from 1900 is inadequate except in the few cases of states admitted after that time (Oklahoma, New Mexico, Arizona in the lower 48).

Similarly, section II, Explanation of Rule, under Criteria, reasons, "a tribe in existence when the IRA was passed was in existence historically." This is not historically accurate. In the San Francisco Bay Area, there were at least two rancherias that were purchased for tribes under the Rancheria Act in the 1920s, but not inhabited until the mid-1930s. The rancheria existed but there was no tribe. Further, many, if not most, of the rancherias were purchased from non-Indians, and were therefore state governed lands, not Indian governed land. The Indians on these lands often were not intact tribes, but scattered and homeless Indians who had left their tribal units, had no tribal relation to one another, and did not organize as tribes. Most important, the lands were not considered sovereign Indian lands. In recent years, the existence of these rancherias has become the basis for recognition of tribes under the fiction that this was a restoration of recognition. That often was not true.

The Summary states that the general purpose of the proposed rule is to make the criteria and the process for acknowledgment of an Indian tribe more transparent, promote consistent implementation, and increase timeliness and efficiency, while maintaining the integrity of the process. However, the Summary focuses in specific on the purposes for changing the *process*, not the *criteria*. The proposal states that the *process* is broken. "Specifically, the process has been criticized as too slow..., expensive, burdensome, inefficient, intrusive, less than transparent, and unpredictable." This does not justify the changes of the criteria.

The Explanation of Rule heavily relies on a desire to "substantially reduc[e] the documentary burden on petitioners and the public and review time by the Department." While elimination of unnecessary documentary burdens would be a worthwhile goal, it does not justify elimination of criteria that serves a still valid and needed purpose.

For these reasons, the proposed changes in criteria seem more result-oriented than motivated to reach fair results. When the regulations were amended in 1994, BIA claimed that the regulations were neutral in result, and would not result in acknowledgment of tribes that wrote:

> "None of the changes made in these final regulations will result in the acknowledgment of petitioners which would not have been acknowledged under the previously effective acknowledgment regulations." 59 FR 9280

The Explanation of Rule, here, claims that the changes proposed "depart only in very modest ways from our existing Part 83 criteria." 79 FR 30768. However, there is no claim that the results will be modest.

In this regard, we note criticism of the existing rule focusing on the results, namely, tribal groups lack of success in seeking recognition. Thus, in September 1997, the Advisory Council on California Indian Policy, a group appointed by Congressional act to evaluate the condition of California Indians and make recommendations, issued comments on the regulations that centered on results rather than on the merit of the provisions. Its Executive Summary (at p.20) read:

> The current federal acknowledgment process (25 C.F.R. Part 83) is not appropriate for California Tribes. Since the procedure was established in 1978, only one California tribe has successfully completed the process.

The concern is that the criteria is being changed not to achieve a more fair result, but in order to increase the number of tribes that are acknowledged.

COMMENTS ON SPECIFIC REGULATIONS

Title of Part 83

Part 83 is called "Procedures for Acknowledgment of Federally Recognized Indian Tribes." This is not clear and seems circular. If a Federal Indian tribe is recognized, it does not need to be acknowledged. Rather, the rule is intended to acknowledge Indian tribes that are not yet recognized and that is what the title should convey.

Second, the heading is not complete. It refers to "procedures" but Part 83 establishes both procedures and criteria for recognition of Indian tribes.

§83.1 What terms are used in this part?

"Recognition" and "acknowledgment"

The terms "recognition" and "acknowledgment" are used throughout the regulations as having the same or similar meaning. However, neither of these terms is defined, and whether they have the same meaning is not clear.

Further, we suggest that neither term is appropriate as to the resolution of whether a tribe has sovereignty over lands. The term recognition is used with respect to foreign governments to establish foreign relations, but recognition is a political decision, not a legal one. Here the resolution of whether a tribe has sovereignty would involve a legal determination of status, and not a political decision. The use of different terminology would better prevent confusion of the two. To the extent that the regulations are intended to confirm that a tribe has sovereignty over lands, we suggest that the word "determination" be used.

Federally recognized Indian tribe

The phrase "federally recognized Indian tribe" is not currently defined in the regulations, and the proposed definition would not be consistent with statutory law or with other regulations. The proposed definition reads "an entity listed on the Secretary's list of federally recognized tribes, which the Secretary currently acknowledges as an Indian tribe for purposes of Federal law and with which he/she maintains a government-to-government relationship." This definition subscribes far more meaning to listing than given by the statute. As quoted above, section 479a-1 provides that the listing is of tribes "recognize[d] to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Section 479a-1 says nothing about acknowledging such tribes as an Indian tribe for purposes of Federal law nor states that the Secretary maintains a government-to-government relationship with listed tribes. This definition is also inconsistent with section 83.6 which sets forth the Department's duty to publish a list of tribes the Secretary recognizes to be eligible for federal benefits and services provided to Indians and does not say that tribes listed also have a government-to-government relationship.

"Government-to-government relationship"

The phrase "government-to-government relationship" is often used in the regulations but has no clear meaning and is not defined. A government usually refers to the governing body of a territorial state. Here, the criteria do not require that the tribe establish that the tribe already has rights to lands or has rightful sovereignty over it or that it has an organized "government." Further, such requirements would greatly limit the number of tribes qualifying for federal benefits.

"For purposes of federal law"

The definition of Federally recognized Indian tribe refers to acknowledgment of an Indian tribe "for purposes of Federal law." The implication is that even if a tribe is not recognized for purposes of Federal law, it might still exist. The phrase, which is not in the current regulations, carries an underlying criticism of the recognition process, and undercuts the law's authority.

"Historical"

The term "historical" is defined as 1900 or earlier. This is not consistent with law with regard to recognition of a tribe's sovereignty. A showing that an Indian group existed in 1900 would not be sufficient basis for recognition of an Indian group's sovereignty in a state which was admitted before 1900. Rather, the question is whether the Indian group was organized as a political body, held a specific site of land when the state was formed, and was permitted to remain there as a sovereign body. If the state was admitted before 1900, the tribe would need to establish its rights prior to 1900, and this definition would not be sufficient.

"Informed Party"

The term "informed party" does not have any meaning close to the given definition and thus is inherently misleading. The term is defined to mean people who have requested to be kept informed, but the term "informed party" does not convey this meaning. Rather its apparent meaning is people who are informed. We suggest that the phrase "Interested Third Party" would be preferable.

"Previous Federal acknowledgment"

This definition fails to differentiate between the two types of acknowledgment, and thus is problematic.

"Tribe"

The term "tribe" is defined as a tribe, band, nation, pueblo, village or community. The purpose of the regulations is to decide whether an Indian group will be recognized as a tribe. Only if the group is acknowledged as a tribe are they a tribe. The definition should say that a tribe is a group of Indians that are acknowledged by the Secretary as a tribe. If an Indian group is not recognized, the federal government does not consider the group to constitute a tribe.

§83.2 What is the purpose of these regulations?

There are a number of problems with this regulation as proposed. First, it states in the first line that it the regulations are "to implement Federal statutes." While that is true as to recognition of eligibility for federal benefits, that is not true as to recognition of sovereignty.

Second, in the second line, the regulation states that it is for the benefit of "Indian tribes." However, it is for the benefit of all petitioners, whether they are eventually recognized or not. Saying that it is for the benefit of Indian tribes creates a presumption that anyone who applies for recognition is an Indian tribe, whether they are eventually recognized or not.

Third, the regulation fails to differentiate between the two types of recognition discussed above and the fact that a determination of eligibility for federal benefits does not mean that a tribe has sovereignty.

Fourth, the proposed regulation would state "Failure to be included on the list does not deny that the entity is an Indian tribe for purposes other than Federal law." It is not clear why this sentence is included. Again it seems intended to undercut the authority of the Department and any negative determination. This again is completely improper.

Fifth, the proposed regulation would say that federal recognition is a prerequisite to the services and benefits available to those groups that qualify as Indian tribes and possess a government-to-government relationship. This wording makes it sound like Indian groups possess a government-to-government relationship whether or not they qualify as Indian tribes. A petitioner has to qualify for recognition but not for a government-to-government relationship. This is not correct.

Sixth, the proposed regulation would provide that federal recognition entitles a tribe to immunities and privileges available to other federally recognized tribes. However, this should be available only to tribes that exercise rightful sovereignty over some land, not to Indian groups that just qualify for federal benefits.

83.5 How does a petitioner obtain Federal acknowledgment under this part?

The criteria for acknowledgment should depend on which of the two types of recognition the group is seeking. The criteria listed are not proper for a determination that the petitioner has sovereignty over a parcel of land. The criteria for that are listed under General Comments, section I above.

§83.10 How will the Department evaluate each of the criteria?

Section (a) provides that a petitioner need establish only a "reasonable likelihood" that the petitioner meets the criteria. It continues, the petitioner must show more than a mere possibility but does not need to meet a "more likely than not" standard. The phrase "reasonable likelihood" is too vague and too subjective. Although the Executive Summary claims the changes update the criteria "to include objective standards," it would leave in place this very subjective standard.

Further, regarding making a determination that the Indian group exercises sovereignty over the area, such a standard would conflict with constitutional protections of state rights. The state cannot be denied sovereignty over lands within its borders based on less than a showing of facts establishing that the tribe has that sovereignty. Further, this could have no binding effect on a state unless it participated in the administrative process.

Sections (b)(2) and (3) provide that the Department will take into account situations and time periods for which evidence is limited or not available and take

into account limitations inherent in demonstrating historical existence. Those accommodations are not appropriate when determining whether a tribe has sovereignty over a site and violate the state's constitutional rights.

Section (b)(4) requires demonstration that these criteria are met on a substantially continual basis and without substantial interruption. Section (b)(5) provides that substantial interruption would be "20 years or less." This appears to be a clerical error, and that the intent was to provide that substantial interruption would be a gap of "20 years or more." As a separate point, with regard to determination whether a tribe has sovereignty over a site, one issue raised is whether sovereignty is lost under equitable principles such as laches, acquiescence or impossibility. Determination of that depends not so much the length of the gap but whether the gap creates reasonable expectations in others and prejudices the rights of those others. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

§83.11 What are the criteria for acknowledgment as a federally recognized Indian tribe?

As discussed above, different criteria for acknowledgment should apply depending on whether the group is seeking to qualify for federal services and benefits or is seeking a determination that they have sovereignty over a specific parcel of land. These are two very different types of acknowledgment. This regulation fails to differentiate between the two types of recognition and to apply different criteria to the different types. In particular, the regulation fails to apply appropriate criteria for a showing that the tribe has sovereignty over certain lands. These criteria are specified in the General Comments, section I, above.

(a) Tribal Existence

This regulation would require the petitioner to demonstrate its existence as an Indian tribe during the historic period, but that often would not be sufficient to establish sovereignty over lands. The historic period extends to 1900, and as discussed above, in order to establish rightful sovereignty over lands, a tribe must demonstrate that it pre-existed the state and was allowed to remain on lands in the state when the state was formed. Most of the time, this will require demonstration of facts from before 1900, sometimes long before 1900.

(b) Community

This regulation would require the petitioner to demonstrate that it existed as a distinct community from 1934 until the present without substantial interruption, and that it now constitutes a distinct community. This is not sufficient to base a determination that a tribe has sovereignty over certain lands. Rather, as discussed above, a tribe must demonstrate that it exercised sovereignty over an area continuously since the state was formed. If, in fact, aboriginal tribal sovereignty was abandoned and the state assumed sovereignty over an area, it is gone.

We note that when the Department proposed regulations in 1994 requiring tribes to demonstrate continuous existence since first sustained contact, comments were received that petitioners be required to demonstrate continuity only since 1934. The Department responded as follows:

> The purpose of the acknowledgment process is to acknowledge that a government-to-government relationship exists between the United States and tribes which have existed since first contact with non-Indians. *Acknowledgment* as a historic tribe requires a demonstration of continuous tribal existence. A demonstration of tribal existence since 1934 would provide no basis to assume continuous existence before that time.
>
> 59 FR 9281

Further, it is not enough for the tribe to demonstrate that it constituted a distinct community. In order to obtain a determination that it is sovereign over a site, it must demonstrate that it has exercised sovereignty as a separate, distinct community continuously.

The regulation then allows three different formulations of evidence.

Section (b)(1) would allow an Indian group to demonstrate community if 30 percent or more of the petitioner's members constituted a distinct community at a given point in time. This is not sufficient to demonstrate sovereignty over land. The need to constitute a distinct community applies at all times.

Section (b)(2) would allow an Indian group to satisfy the community component if 50 percent or more of the members satisfied certain criteria at a given point in time. Again, it is not sufficient to demonstrate distinct community at a given point in time. Rather, the community element applies at all times.

Section (b)(3) would consider petitioner a community if it has maintained since 1934 to the present a "State reservation." The term "State reservation" is not defined and the legal significance of a state reservation is not clear, especially in regard to a determination regarding the tribe's sovereignty. The term "reservation" is commonly used by the federal government to refer to reservation of use of federal land. For example, use can be as a national park, as a monument, for a military installation, or for a specific tribe of Indians. Reservation of land does not mean that a tribe has sovereignty over it. The designation of the site as a state reservation does not mean that the state considers the land to be under tribal sovereignty. Therefore, it is possible that the designation has no legal significance. Again the date of 1934 has no legal significance.

As an alternative, section (b)(3) allows an Indian group to satisfy the community requirement if the United States has held land for the petitioner at any point in time from 1934 to the present. With respect to acknowledging sovereignty of a tribe, this is improper. Title and jurisdiction are two completely different aspects of dominion over land, and the fact that the United States holds title over land has no bearing on whether the tribe has rightful jurisdiction over the site. Again, the 1934 date has no legal significance in the inquiry over sovereignty.

(c) Political Influence or Authority

This regulation requires the petitioner to demonstrate maintenance of political influence or authority from 1934 until the present without substantial interruption, defines the terms "political influence or authority" and describes the evidence that may be used to demonstrate political influence or authority. The demonstration of political influence or authority from 1934 until the present does not satisfy the showing needed to establish tribal sovereignty over the site. To justify sovereignty, an Indian group would need to show that they had sovereignty, before, during and after state formation. They would also need to show exercise of control by the tribe. Mere influence would not by the tribe would not be sufficient.

§83.12 What are the criteria for previously federally acknowledged petitioners?

This regulation treats previously federally acknowledged petitioners differently from petitioners not previously acknowledged, but again the criteria fail to satisfy the elements to show that a tribe has rightful sovereignty over a certain site.

§83.22 What notice will OFA provide upon receipt of a documented petition?

This regulation would require that notice of a petition for acknowledgment be sent to the governor and attorney of the State in which the petitioner is located and any other tribes within a 25-mile radius. This is not sufficient. Over recent years, it has become more and more apparent that other non-government parties may be interested in a petition for recognition by an Indian tribe if the recognition concerns sovereignty over lands in the area. For this reason, notices should be given to all residents, landowners, businesses and local governments in the same 25-mile radius used for tribal notices.

* * *

We appreciate your consideration of these comments.

Sincerely,

Alan Titus